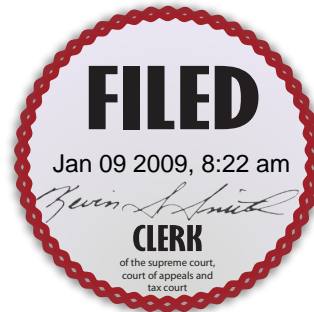


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**DAVID A. HAPPE**  
Lockwood Williams & Happe  
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**ANGELA N. SANCHEZ**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

NICHOLAS LYONS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0802-CR-185
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jose Salinas, Judge  
Cause No. 49G14-0607-FD-134969

---

**January 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issues

Following a bench trial, Nicholas Lyons appeals his convictions of possession of cocaine, a Class D felony, and possession of paraphernalia, a Class A misdemeanor. Lyons raises two issues for our review, which we restate as: 1) whether the evidence is sufficient to support his conviction of possession of cocaine; and 2) whether the evidence is sufficient to support his conviction of possession of paraphernalia. Concluding that the evidence is sufficient to support the conviction for possession of cocaine, but that the evidence is not sufficient to support the possession of paraphernalia conviction, we affirm in part and reverse in part.

### Facts and Procedural History

On July 23, 2006, Lyons was in the front passenger seat of a vehicle driven by a former co-worker who had agreed to give him a ride across town. Indianapolis Metropolitan Police Department Officer Brent McDonald saw that the vehicle did not have a license plate. Officer McDonald turned on his emergency lights to initiate a traffic stop, but the vehicle did not comply. A chase ensued, which ended with the vehicle containing Lyons colliding with a parked van.

After the collision, the driver exited the vehicle and ran southbound down the street. Officer McDonald pursued the driver on foot, running past the vehicle where Lyons remained. Lyons soon exited the vehicle and walked northbound. He walked past a few houses and turned left into an alley where the van's owner stopped and confronted him. Lyons repeatedly told the van's owner to let him pass. At that point, another police officer arrived, and Lyons cooperated while he was arrested.

Back at the vehicle, a K-9 officer indicated to Officer McDonald that the dog had alerted to possible narcotics under the front passenger seat. Officer McDonald then investigated under the seat where Lyons had been sitting and found a small bag of what was later determined to be cocaine. Officer McDonald also found what he identified as a pipe used to smoke cocaine in the cupholder between the front seats. However, no evidence of cocaine or cocaine residue was discovered in the pipe.

On July 24, 2006, the State charged Lyons with one count of possession of cocaine, a Class D felony; one count of possession of paraphernalia, a Class A misdemeanor; and one count of resisting law enforcement, a Class A misdemeanor. At the close of the State's evidence, the trial court granted a directed verdict to Lyons on the resisting law enforcement charge and, at the conclusion of the bench trial, found Lyons guilty of possession of cocaine and paraphernalia. At the sentencing hearing, the parties agreed to a court-imposed sentence of 270 days on each count, to be served concurrently. Lyons appeals the underlying convictions.

### Discussion and Decision

#### I. Standard of Review

Our standard of review in a sufficiency of the evidence claim is well settled: it is the fact-finder's role to decide whether there is sufficient evidence to prove each element of an offense. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). "[A]ppellate courts must consider only the probative evidence and reasonable inferences supporting the verdict." McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). The appellate court does not evaluate the weight of the evidence or the credibility of the witnesses. Id. To support

a conviction it is not necessary that the evidence “overcome every reasonable hypothesis of innocence.” Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (quoting Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995)). Rather, we will affirm a conviction if there is substantial evidence of probative value supporting the lower court’s conclusion. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003).

## II. Sufficiency of Evidence for Possession of Cocaine

The trial court found Lyons guilty of possession of cocaine, a Class D felony. To convict Lyons of possession of cocaine, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed cocaine. Ind. Code § 35-48-4-6(a). On appeal, Lyons argues that there was insufficient evidence to convict him of possession of cocaine because he was a passenger in the vehicle where the cocaine was found, another person was driving the vehicle, and no other factors indicate he was aware of the cocaine or intended to maintain control over it.

A conviction for possession of cocaine may be supported by proof of actual or constructive possession. Whitney v. State, 726 N.E.2d 823, 825 (Ind. Ct. App. 2000). Constructive possession of cocaine requires proof of (1) the intent to maintain dominion and control over the cocaine and (2) the capability to maintain dominion and control over the cocaine. Lampkins v. State, 682 N.E.2d 1268, 1275 (Ind. 1997). When a defendant does not have exclusive possession of the place where the drugs are found, the inference of the defendant’s intent to maintain dominion and control over the drugs must be supported by some additional circumstances. Id. Our supreme court has previously cited the following as examples of additional circumstances supporting constructive

possession: “(1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant’s plain view, and (6) the mingling of the contraband with other items owned by the defendant.” Gee v. State, 810 N.E.2d 338, 341 (Ind. 2004) (citing Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999)).

In Lampkins, our supreme court held there was sufficient evidence of constructive possession of cocaine where the defendant was a passenger in the vehicle where the drugs were found. 682 N.E.2d at 1276. The cocaine was under the defendant’s seat in the officer’s plain view. Id. at 1275. The court found that the defendant’s proximity to the contraband in plain view coupled with testimony from the driver’s girlfriend were sufficient additional circumstances to infer that the defendant intended to maintain control and dominion over the cocaine under his seat. Id. at 1276.

Here, Lyons did not have exclusive control over the vehicle in which the cocaine was found. Therefore, we must consider the evidence of additional circumstances indicating Lyons’s intent and ability to maintain control over the cocaine. There is evidence of the proximity of the cocaine to Lyons, as it was discovered under the passenger seat where Lyons had been sitting. See Lampkins, 682 N.E.2d at 1275. Further, there is evidence of attempted flight. Lyons argues on appeal that walking away from the scene does not constitute flight. However, the trial court found, and we agree, that Lyons veered too far from the scene. That finding plus Lyons’s comments to the van owner to let him pass so he could continue away from the scene demonstrate attempted

flight. The fact that Lyons walked away does not compromise this conclusion. We have previously considered that “flight” is determined by the attempt to avoid prosecution; the manner in which that is done is inconsequential. See Wellman v. State, 703 N.E.2d 1061, 1063 (Ind. Ct. App. 1998) (holding that the speed, mode, or manner of retreat is irrelevant).

Sufficient evidence exists to allow the trier of fact to conclude that Lyons intended to maintain dominion and control of the cocaine and was capable of doing so. We do not review the trial court’s determinations that Lyons’s assertions—that he was not fleeing and that the driver stashed the pipe and cocaine under the passenger seat just before exiting the vehicle—were not credible. See Drane, 867 N.E.2d at 146. Therefore, we hold that the evidence was sufficient to support Lyons’s conviction for the possession of cocaine.

### III. Sufficiency of Evidence for Possession of Paraphernalia

“A person who knowingly or intentionally [possesses paraphernalia] commits a Class A misdemeanor.” Ind. Code § 35-48-4-8.3(b). To convict Lyons of possession of paraphernalia, the State had to prove beyond a reasonable doubt that he knowingly or intentionally possessed “a raw material, an instrument, a device, or other object that the person intend[ed] to use for: (1) introducing into the person’s body a controlled substance . . . .” Ind. Code § 35-48-4-8.3(a)(1). Lyons argues that Officer McDonald’s identification of the object found in the vehicle’s cupholder as “a pipe used to smoke the cocaine” was insufficient evidence to prove that the pipe was paraphernalia and that he possessed it with intent to use it with the cocaine. Transcript at 11.

Evidence of an object, such as the pipe, that may be used with illegal drugs is not sufficient to prove the intent element required for possession of paraphernalia unless the State introduces evidence to support the inference that the pipe was intended for use with the cocaine. See McConnell v. State, 540 N.E.2d 100, 102 (Ind. Ct. App. 1989). The specific intent required for a paraphernalia conviction may be proved by circumstantial evidence, such as evidence of previous convictions for drug use, see Von Hauger v. State, 255 Ind. 666, 668, 266 N.E.2d 197, 198 (1971); admission to former drug use coupled with needle marks on defendant's arms, see Stevens v. State, 257 Ind. 386, 388-89, 275 N.E.2d 12, 13 (1971); or expert testimony that paraphernalia contained drug residue, see McConnell, 540 N.E.2d at 103-04. Evidence of flight and attempted concealment, without more, however, is not sufficient to prove specific intent. Bradley v. State, 153 Ind. App. 421, 429, 287 N.E.2d 759, 763 (1972).

The only testimony connecting the pipe to the cocaine was Officer McDonald's identification of State's Exhibit 1 as "suspected cocaine and a pipe used to smoke the cocaine." Tr. at 11. There was no testimony to establish that Officer McDonald was qualified as an expert in drug testing or was otherwise familiar with drug paraphernalia due to his training and experience. There was no evidence that the pipe was similar to pipes in which cocaine is smoked, nor was there evidence of cocaine or residue in the pipe, and the pipe and cocaine were found in different locations in the vehicle. Therefore, there was no support for Officer McDonald's linking of the cocaine and pipe. Moreover, there was no evidence that Lyons had past drug convictions or was a drug user. In the absence of any evidence to support an inference that Lyons intended to use

the pipe to introduce the cocaine into his body, we hold that the evidence is insufficient to support Lyons's conviction for possession of paraphernalia.

### Conclusion

We conclude that the evidence is sufficient to support Lyons's conviction for possession of cocaine. The evidence is insufficient, however, to support Lyons's conviction for possession of paraphernalia because there is no evidence to show Lyon's intent to use the paraphernalia to introduce a drug into his body. We therefore affirm Lyons's possession of cocaine conviction and reverse his possession of paraphernalia conviction.

Affirmed in part, reversed in part.

NAJAM, J., and MAY, J., concur.